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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JASON K. SCHNITZER, DANIEL J. RICE,
ROBERT F. CRUICKSHANK III, and ANDREW J. ZAJKOWSKI

Appeal 2008-2731
Application 09/995,058
Technology Center 2100

Decided: February 4, 2009

Before JAMES D. THOMAS, HOWARD B. BLANKENSHIP, and
THU A. DANG, *Administrative Patent Judges*.

DANG, *Administrative Patent Judge*.

DECISION ON APPEAL

I. STATEMENT OF CASE

Appellants appeal under 35 U.S.C. § 134 from a final rejection of
claims 1, and 3-10. We have jurisdiction under 35 U.S.C. § 6(b).

A. INVENTION

According to Appellants, the invention relates to telecommunications networks, and more particularly to software upgrades of redundant network components (Spec. 2, ll. 11-13).

B. ILLUSTRATIVE CLAIM

Claim 1 is exemplary and is reproduced below:

1. A system for use with a broadband network, the system comprising:

a data collector coupled to obtain network performance metrics from network elements in the at least a portion of the broadband network; and

logic to normalize the performance metrics by applying device-specific information for the network elements from which the network performance metrics were obtained.

C. REJECTIONS

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Dziekani	US 6,704,288 B1	Mar. 9, 2004
Agarwal	US 2003/0028642 A1	Feb. 6, 2003

Claims 1, and 3-10 stand rejected under 35 U.S.C. § 103(a) over the teachings of Dziekan in view of Agarwal.

We affirm.

II. ISSUE

The issue is whether Appellants have shown that the Examiner erred in finding that claims 1 and 3-10 are unpatentable under 35 U.S.C. § 103(a) over the teachings of Dziekan and Agarwal. In particular, the issue turns on whether the combination of Dziekan and Agarwal discloses a “logic to normalize performance metrics by applying device-specific information for the network work elements” (claim 1).

III. FINDINGS OF FACT

The following Findings of Fact (FF) are shown by a preponderance of the evidence.

Dziekan

1. Dziekan discloses a quality of service (QoS) monitor 140 concerned with collecting network performance metrics such as bit error rate (BER), frame error rate (FER), throughput at selected devices, and reporting the collected data to the subscribed service providers (col. 4, l. 58 to col. 5, l. 4; Fig. 1).
2. Return path monitoring include measurements of BER, lost frames, endless ranging, carrier-to-noise (C/N) ratios, and other measurements made at the physical or MAC level layers (col. 5, ll. 44-47).
3. Service manager 120 maps specific services and service providers to specific network elements (col. 4, ll. 13-17).

4. Service manager 120 determines if a service provider is authorized to access management information base (MIB) objects of the network elements and receive reports of the network elements' failure (col. 4, ll. 31-34).

Agarwal

5. Agarwal discloses feeding monitored information to Aggregator 120, which accumulates and normalizes the metrics in some meaningful fashion, which leads to metrics on the global usage of each resource class (p. 4, [0078]; Fig. 1).

IV. PRINCIPLES OF LAW

"[T]he PTO gives claims their 'broadest reasonable interpretation.'" *In re Bigio*, 381 F.3d 1320, 1324 (Fed. Cir. 2004) (quoting *In re Hyatt*, 211 F.3d 1367, 1372 (Fed. Cir. 2000)). "Moreover, limitations are not to be read into the claims from the specification." *In re Van Geuns*, 988 F.2d 1181, 1184 (Fed. Cir. 1993) (citing *In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989)). Our reviewing court has repeatedly warned against confining the claims to specific embodiments described in the specification. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1323 (Fed. Cir. 2005) (en banc).

One cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. *In re Merck & Co., Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986).

Section 103 forbids issuance of a patent when “the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.”

KSR Int'l Co. v. Teleflex Inc., 127 S. Ct. 1727, 1734 (2007).

The Supreme Court emphasized “the need for caution in granting a patent based on the combination of elements found in the prior art,” and discussed circumstances in which a patent might be determined to be obvious. *KSR*, 127 S. Ct. at 1739 (citing *Graham v. John Deere Co.*, 383 U.S. 1, 12 (1966)). The Court reaffirmed principles based on its precedent that “[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *Id.* The operative question in this “functional approach” is thus “whether the improvement is more than the predictable use of prior art elements according to their established functions.” *Id.* at 1740.

We must determine whether or not the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. *See KSR*, 127 S. Ct. at 1734. Obviousness determination is not the result of a rigid formula, and we will consider the facts of a case and the common sense of those skilled in the art. *Leapfrog Enters., Inc. v. Fisher-Price, Inc.*, 485 F.3d 1157, 1161 (Fed. Cir. 2007). That is, the test for obviousness is

rather what the combined teachings of the references would have suggested to those of ordinary skill in the art. *See In re Keller*, 642 F.2d 413, 425 (CCPA 1981); *In re Young*, 927 F.2d 588, 591 (Fed. Cir. 1991).

V. ANALYSIS

Claims 1 and 8

Appellants argue that “[t]here is not even any indication in Dziekan that the device configuration module 190 collects and uses device-specific information at all, let alone to process performance metrics” and that “Agarwal does not teach normalizing performance metrics according to device-specific information” (App. Br. 8). However, the Examiner finds that “Appellant is considering the references individually without taking into consideration the combined teaching of Dziekan in view of Agarwal (Ans. 6). Thus, an issue we address on appeal is whether the combination of Dziekan and Agarwal teaches a “logic to normalize performance metrics by applying device-specific information for the network work elements” (Claim 1).

We begin our analysis by giving the claims their broadest reasonable interpretation. *See In re Bigio*, 381 F.3d at 1324. Furthermore, our analysis will not read limitations into the claims from the Specification. *See In re Van Geuns*, 988 F.2d at 1184. It is the Appellants’ burden to precisely define the invention. *See In re Morris* 127 F.3d 1048, 1056 (Fed. Cir. 1997).

Appellants' claims simply do not place any limitation on what "normalize" is to be, to represent, or to mean, other than that the performance metrics are normalized by "applying device-specific information."

We generally agree with the Examiner's finding that the combination of Dziekan in view of Agarwal teaches the claimed elements on appeal beginning at page 4 of the Answer, and including the Examiner's corresponding responsive arguments beginning at page 6 of the Answer.

Dziekan discloses obtaining network performance metrics from network elements in a broadband network (FF 1), and applying measurements made at the physical and MAC level layers for the network elements (FF 2), wherein specific services and service providers are mapped to specific network elements (FF 3). An artisan would have understood that such measurements made at the physical level layers and such information for mapping such specific network element includes device-specific information. Thus, we find Dziekan teaches or at the least suggests obtaining network performance metrics from network elements and applying device specific information for the network elements.

Agarwal discloses normalizing the network performance metrics (FF 5). We find an artisan would have understood Dziekan in view of Agarwal would teach or at least suggest a logic to normalize performance metrics wherein the logic includes applying device-specific information for the network elements. That is, we find the subject matter sought to be patented by Appellants as a whole would have been obvious to the artisan as we

consider the facts of the case and the common sense of those skilled in the art. *See Leapfrog*, 485 F.3d at 1161. That is, the test for obviousness is rather what the combined teachings of the references would have suggested to those of ordinary skill in the art. *See In re Keller*, 642 F.2d at 425 and *In re Young*, 927 F.2d at 591.

Appellants have presented no evidence that adding the teachings of Dziekan of obtaining performance metrics and applying device specific information to the teachings of Agarwal of normalizing the metrics for global usage "was uniquely challenging or difficult for one of ordinary skill in the art" (*see Leapfrog*, 485 F.3d at 1162), nor have Appellants presented evidence that these "represented an unobvious step over the prior art" (*id.*). Rather, Appellants' invention is simply an arrangement of the well-known teachings of obtaining performance metrics and applying device-specific information with the well-known teaching of normalizing performance metrics.

A person of ordinary skill will be able to fit the teachings of Dziekan and Agarwal together like pieces of a puzzle to obtain the benefits set forth in the references, since the person of ordinary skill is also a person of ordinary creativity, not an automaton. The combined teachings of the references represent merely a combination of familiar elements according to known methods and do no more than yield predictable results. *See KSR*, 127 S. Ct. at 1739. That is, the invention is not more than the predictable use of prior art elements according to their established functions. *See id.* at 1740.

Although Appellants argue that “[t]here is not even any indication in Dziekan that the device configuration module 190 collects and uses device-specific information at all, let alone to process performance metrics” and that “Agarwal does not teach normalizing performance metrics according to device-specific information” (App. Br. 8), the Appellants appear to be arguing that Dziekan or Agarwal alone fails to disclose or suggest the claim limitations. However, the Examiner has rejected the claims based on the combination of Dziekan and Agarwal, and nonobviousness cannot be shown by attacking the references individually. *See In re Merck*, 800 F.2d at 1097. As the Examiner finds, the Appellants are “considering the references individually without taking into consideration the combined teaching of Dziekan in view of Agarwal” (Ans. 6).

In the Reply Brief, Appellants further argue that “Dziekan describes configuring network devices into different modes, whereas the claims describe *applying device-specific information to normalize performance metrics*” (Reply Br. 2). The Appellants appear to be arguing that Dziekan does not disclose applying device-specific information to *only* normalize performance metrics, because Dziekan *also applies device-specific information for configuring the network devices into different modes*. However, our analysis will not read limitations into the claims, wherein we will not read “only normalize” or “cannot also apply device-specific information for configuring the network devices into different modes” into the claimed limitation of “applying device-specific information.” As

discussed, we find that an artisan would have understood that such Dziekan in view of Agarwal would teach or at least suggest a logic to normalize performance metrics wherein the logic includes applying device-specific information for the network elements. In fact, by contending that Dziekan describes configuring the specific network devices, Appellants are admitting that Dziekan discloses such applying device-specific information for the network devices (Reply Br. 3).

Claims 3 and 10

As to claim 3, Appellants also argue that “[t]here is no teaching anywhere in either reference of applying make, model, hardware version, software version, or element settings to the normalization of network performance parameters” (App. Br. 9). Besides setting forth alternative recitations in the claim, the Examiner finds that “Dziekan discloses device-specific information that includes information on how certain pre-defined parameters of the network elements are set” and “[t]his ‘element setting’ information is applied to the normalization of the network performance parameters” (Ans. 7). We agree with the Examiner.

Appellants’ claims simply do not place any limitation on what “element settings” means, includes or represents. Dziekan discloses applying measurements made at the physical level layers for the network elements (FF 2), wherein specific services and service providers are mapped to specific network elements (FF 3). We find that such information at the physical level layers that are used to map the specific network elements is

information that is used for element settings. That is, Dziekan need not duplicate word for word what is in the claims. *See Standard Havens Prods. v. Gencor Indus.*, 953 F.2d at 1369. We thus, agree with the Examiner that Dziekan when combined with Agarwal discloses device-specific information which includes “element settings associated with each of the network elements” (claim 3).

Appellants have not shown in the Appeal Brief or in the Reply Brief any argument to dispute that the Examiner has correctly shown where this claimed element appears in the prior art.

Claims 4 and 9

As to claim 4, Appellants admit that “Dziekan teaches accessing the MIB to receive reports,” but also argue that “Dziekan does not teach that the MIB is accessed for device-specific information for use in normalizing network performance metrics” (App. Br. 10). However, the Examiner finds that “the combined teaching of Dziekan and Agarwal, suggest that the MIB is accessed for device-specific information for use in normalizing network performance metrics” (Ans. 8). We agree with the Examiner.

The Examiner has rejected the claims based on the combination of Dziekan and Agarwal. Dziekan discloses obtaining MIB objects and determining device-specific information (FF 4). As discussed above, we find an artisan would have understood the combined teachings of Dziekan and Agarwal to be a logic to normalize the performance metrics by applying device-specific information. We thus agree with the Examiner that Dziekan

when combined with Agarwal discloses obtaining MIB objects wherein the logic is “further to determine the device-specific information” from the MIB objects (claim 4).

Appellant has not shown in the Appeal Brief or in the Reply Brief any argument to dispute that the Examiner has correctly shown where this claimed element appears in the prior art.

Claims 5-7

As to claims 5-7, Appellants do not provide separate arguments with respect to the rejection of independent claim 1. As discussed above, we find no deficiency regarding Dziekan in view of Agarwal in the rejections of claim 1. Thus, we conclude that the Appellants have not shown that the Examiner erred in rejecting claims 5-7 over the teachings Dziekan in view of Agarwal.

VI. CONCLUSION OF LAW

(1) Appellants have not shown that the Examiner erred in finding that claims 1 and 3-10 are unpatentable under 35 U.S.C. § 103(a) over the teachings of Dziekan and Agarwal.

(2) Claims 1 and 3-10 are not patentable.

VII. DECISION

The Examiner’s rejection of claims 1 and 3-10 under 35 U.S.C. § 103(a) is affirmed.

Appeal 2008-2731
Application 09/995,058

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

pgc

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